COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-1777-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS W. KOEPPEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge and MICHAEL O. BOHREN, Judge.[1] *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

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[1] The Honorable Donald J. Hassin, Jr. presided at trial and entered the judgment of conviction. The Honorable Michael O. Bohren heard the postconviction motion and entered the order denying postconviction relief.

¶1 PER CURIAM. Thomas W. Koeppen appeals from a judgment of conviction of bail jumping as a habitual criminal and from an order denying his motion for postconviction relief. Koeppen argues that the evidence adduced at trial was insufficient and that he was denied his right to due process of law and a speedy trial. He also contends that it was error to admit "other acts" evidence and legal opinions as to the meaning of the conditions of the bond. Koeppen's claims are based on a construction of the conditions of the bond that is unreasonable and absurd. We conclude that there was no reversible trial court error and affirm the judgment and the order.

¶2 In January 1997, Koeppen was charged with refusing to comply with an officer's attempt to take him into custody, obstruction of an officer, bail jumping and disorderly conduct. At his initial appearance, bail was set at $5,000 cash and Koeppen was ordered not to consume intoxicants and not to have contact with his estranged wife, Geri Koeppen, or her residence on Franklin Drive in New Berlin. On April 1, 1997, an amended bail bond was entered stating that Koeppen shall not "consume alcoholic beverages or illegal drugs," "have violent contact with residence on Franklin Dr.," and "no contact with [G]eri Koeppen." On April 18, 1997, the State moved to clarify the bail conditions because Koeppen informed Geri that the condition that he have no "violent contact" with the residence meant that he could go into the house but could not ruin the house. The court modified the bail conditions and summarized the conditions of release:

> Conditions of release are the standard conditions respecting no law violations, be in court when you are supposed to be. He's not to consume any alcoholic beverages anywhere for any reason nor is he to be upon the premises of any store, bar, tavern, anyplace that sells or serves alcoholic beverages. Additionally, he is to have no contact physically nor is he to attempt to contact by any other means the residence at … Franklin Drive in the City of New Berlin. He's not to be upon those premises for any

> reasons whatsoever. Additionally, he's to have no contact directly, indirectly, through any third person, or other recognized telecommunication means whatsoever with Geri Koeppen.

¶3 Koeppen was required to sign a new bail bond that same day. The written amended bail bond provided that Koeppen shall not "have contact with … Franklin Dr. and Geri Koeppen and no contact through a 3rd party with Geri Koeppen directly or indirectly" and "not be on premises that sell alcohol or serve alcohol."

¶4 On April 27, 1997, Koeppen went to the Franklin Drive residence in an intoxicated state. Geri was present at the residence and called the police. This prosecution followed.

¶5 Koeppen's first claim is based on his reading of the written amended bail bond and the separation of the no contact conditions by the word "and." His defense at trial was that because the bond was stated in the conjunctive, that all the conditions had to be violated for him to be in violation of the bond. Koeppen contends that the evidence was insufficient to support his conviction because there was no proof that on April 27, 1997, he had contact with Geri directly or indirectly through a third person and was not on a premise that sold or served alcohol.

¶6 We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must accept the reasonable inferences drawn from the evidence by the jury. ***Id.*** at 506-07.

¶7 The jury had to determine whether Koeppen "intentionally failed to comply with the terms of his or her bond, that is, that the defendant knew of the terms of the bond and knew that his or her actions did not comply with those terms." ***State v. Dawson***, 195 Wis. 2d 161, 170-71, 536 N.W.2d 119 (Ct. App. 1995). In making its determination the jury was not bound by Koeppen's subjective interpretation of the conditions of the bond. Koeppen's understanding of the terms of the bond presented a question of fact for the jury. No reasonable person would interpret the bond to require the simultaneous commission of three or four acts to constitute a violation. Koeppen's interpretation of the conditions is excessively literal and therefore fails as a reasonable inference from the evidence. As it was free to do, the jury rejected Koeppen's testimony as to his knowledge of the conditions and his intent to comply with those conditions.

¶8 The record supports a finding that Koeppen was aware that he was not to go to the Franklin Drive residence and that he was to have no contact whatsoever with Geri. There was sufficient credible evidence that Koeppen was at the Franklin Drive residence at a time when Geri was present. Since intent may be inferred from conduct, ***State v. Grady***, 93 Wis. 2d 1, 7, 286 N.W.2d 607 (Ct. App. 1979), the conviction is supported by sufficient evidence.

¶9 With respect to the sufficiency of the evidence, Koeppen also claims that because he was not in custody when the amended bond was entered, the State failed to prove the second element of the offense of bail jumping that he "was released from custody on a bond." ***Dawson***, 195 Wis. 2d at 170. Koeppen points out that he was released from custody on the original bond and therefore, the amended bond could not form a basis for the conviction. His claim is absurd and

lacks merit. WISCONSIN STAT. § 969.08(1) (1999-2000)[2] authorizes the trial court to modify the conditions of release. There is no requirement that the defendant be first taken back into custody and formally released under the modified conditions in order for those conditions to be enforceable. The second element was satisfied.

¶10 Koeppen repeatedly suggests that the court's oral pronouncement on April 18, 1997, does not constitute the terms of the bond and cannot support a bail jumping charge. We first point out that our conclusion that the evidence was sufficient to support the conviction was made without reference to the oral pronouncement. Additionally, Koeppen's reliance on ***Dawson***, 195 Wis. 2d at 170, as precluding any reference to the oral pronouncement is groundless. In ***Dawson***, the conviction for bail jumping was reversed because there was no proof that a bond had been executed upon the defendant's release. ***Id.*** at 172-73. ***Dawson*** does not stand for the proposition that the oral pronouncement of conditions has no evidentiary value. Moreover, the bond in this case required Koeppen to submit to "orders and process of the court." By its terms, the bond incorporated the oral pronouncement. Thus, we are free to examine both the written bond and the oral pronouncement in our analysis. *See* ***State v. Simonetto***, 2000 WI App 17, ¶4, 232 Wis. 2d 315, 606 N.W.2d 275.

¶11 We reject Koeppen's claim that his due process right to adequate notice was violated by vagueness in the bond or conflicts between the oral and written conditions. Due process does not demand that the description of the proscribed conduct be drafted with "mathematical exactitude." ***City of Milwaukee v. K.F.***, 145 Wis. 2d 24, 33, 426 N.W.2d 329 (1988). Fair notice and proper

[2] All references to the Wisconsin Statutes are to the 1999-2000 version.

standards for adjudication are all that is required. ***Id.*** Koeppen cannot now assert that he lacked fair notice of the conditions when a no-alcohol and no-contact order was made at his first appearance in the original criminal case. Moreover, the court's oral recitation of the conditions at the April 18, 1997 modification hearing was for the express purpose of making the terms known and unambiguous. Finally, a reasonable reading of the written bond demonstrates that there was no conflict with the oral pronouncement. Koeppen's right to due process was not violated.

¶12 Koeppen describes a great deal of the evidence at trial as "other acts" evidence and claims that it was error to admit this evidence under the three-pronged test set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). He attacks admission of the transcript of the April 18, 1997 bail modification hearing, evidence of his intoxication on April 27, 1997, and testimony describing his conduct at the residence that day, including his possession of a tire iron and that he broke the dryer door. This was not "other acts" evidence and Koeppen has too quickly classified it as such. *See* ***State v. Bauer***, 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902 (recognizing the unjustified trend in classifying evidence as "other acts" evidence).

¶13 Evidence is not "other acts" evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime. *See* Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582, 1606 (1994) (discussing FED. R. EVID. 404(b), which governs the admissibility of other crimes, wrongs or acts). *See also* ***State v. Hereford***, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) ("Testimony of other acts for the purpose of providing

the background or context of a case is not prohibited by § 904.04(2), STATS."). We refuse to apply the "other acts" analysis to evidence that was directly related to the charges. The transcript was relevant to the conditions of bail and Koeppen's understanding of those conditions. The intoxication evidence was part of the crime. Koeppen's conduct at the residence on April 27, 1997 was also transactional evidence. There was no error in the admission of this evidence.

¶14 The true "other acts" evidence which Koeppen challenges is the admission of two prior bail bonds and the criminal complaints alleging that he violated those bonds. On cross-examination, Koeppen was asked to identify bail bonds executed in 1993 and 1994. When Koeppen confirmed that the conditions of bond were clear to him in those cases, he was asked to acknowledge that he had been charged with violating those bonds. This examination followed Koeppen's testimony that he did not intend to violate the clear conditions of the bond.

¶15 The admission of "other acts" evidence is within the discretion of the trial court and our review is limited to whether there was an erroneous exercise of discretion by the trial court. ***State v. Murphy***, 188 Wis. 2d 508, 517, 524 N.W.2d 924 (Ct. App. 1994). The first step in the "other acts" analysis requires the trial court to determine whether the evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 772. As Koeppen accepts, evidence of the prior bonds was offered to demonstrate his intent and knowledge.

¶16 The next determination is whether the evidence is relevant under WIS. STAT. § 904.01, in that it relates to a fact or proposition that is of consequence to the determination of the action and has probative value. ***Sullivan***, 216 Wis. 2d at 772. Koeppen's prior experience with bonds was relevant to his theory of defense that he would abide by the plain terms of the bond and had no

intention of violating it. Koeppen attacks the probative value of the evidence based on "significant differences between the conditions of those bonds and the one at issue in this case." The conditions need not be similar to give the evidence probative value. It is not the conduct which violated the conditions that bears on Koeppen's theory of defense but the demonstrated fact that he intentionally violated the conditions. It was the similarity between the disregard for the conditions of the old bonds and disregard of the conditions of the bond in this case that gives the evidence its probative value. *See* ***id.*** at 786-87 ("the probative value lies in the similarity between the other act and the charged offense. The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence."). It is evidence which directly refuted Koeppen's contention that he was making a good faith effort to comply with the bond.[3]

¶17 The final step in the required analysis is whether the probative value of the "other acts" evidence is substantially outweighed by the danger of unfair prejudice ***Id.*** at 772-73. Koeppen contends that the evidence was prejudicial because it portrayed him as a serial bail jumper. But the issue is not whether the "other acts" evidence is prejudicial because all "other acts" evidence is prejudicial; the issue is whether it is unfairly prejudicial. ***State v. Gray***, 225 Wis. 2d 39, 64, 590 N.W.2d 918 (1999). The evidence was not admitted in the State's case-in-chief but only to impeach Koeppen's testimony during cross-examination. It was not presented as affirmative proof of guilt. In closing argument the prosecutor

[3] Even we were to consider a similarity of conditions as the only indicia of probative value, the conditions in the old bonds were not that different. The 1993 bond prohibited Koeppen from directly or indirectly threatening or harassing victims or witnesses. The 1994 bond prohibited the consumption of alcohol and violent contact with Geri or family members.

explained that Koeppen's conduct with regard to the prior bonds was relevant only to the credibility of his testimony that he would not violate clear bond conditions. Moreover, the cautionary instruction given in this case was designed to anesthetize the very type of prejudice that Koeppen claims—that he be found guilty as a serial bail jumper. *See* ***State v. Hammer***, 2000 WI 92, ¶36, 236 Wis. 2d 686, 613 N.W.2d 629. The cautionary instruction served to eliminate or diminish potential unfair prejudice. ***Id.***; ***State v. Koeppen***, 2000 WI App 121, ¶31, 237 Wis. 2d 418, 614 N.W.2d 530. The trial court properly exercised its discretion in concluding that the probative value was not outweighed by unfair prejudice.

¶18 Koeppen claims that he was deprived of a fair trial because some witnesses were permitted to give unsubstantiated legal opinions as to the meaning of the bond conditions. The trial court's deputy clerk testified about the bond modification hearing held on April 18, 1997. She explained what a bail bond is, what notation she made in her minutes of the proceeding, and how the conditions of the bail bond would be written out by another person based on the minutes sheet. She expressed that her intent in writing the minutes sheet and her understanding of the court's order was that a violation of one condition was a violation of the bond.[4] City of New Berlin police officer Rhonda Eisold testified to her understanding of the offense of bail jumping. She relayed that from a roll call briefing she understood Koeppen's conditions of release to be to refrain from using alcohol, to refrain from going to the Franklin Drive residence, and to avoid

[4] Koeppen cites to testimony of the court clerk who wrote the bond based on the minutes sheet that it was her understanding that a violation of any one of the conditions was a violation of bail. Objections to this testimony were sustained because the testimony approached a legal opinion.

contact with Geri. A letter dated April 21, 1997, from the prosecutor to Geri was also admitted at trial. In explaining the conditions of Koeppen's bond, the letter indicated that violation of any one condition could result in forfeiture of bail. Koeppen characterizes all this evidence as parol evidence on an unambiguous contract.[5]

¶19 The trial court concluded that none of this evidence was a mischaracterization of each individual's belief as to the conditions of release. It found that the evidence was factual and did not approach an impermissible legal opinion. Even if we were to agree with Koeppen that this evidence was legal opinion, we conclude that the resulting error was harmless.

¶20 "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury." ***Sullivan***, 216 Wis. 2d at 792 (citations omitted). The evidence against Koeppen was strong. Koeppen admitted that while on release under the bond he was present at the Franklin Drive residence and had contact with Geri. The terms of the bond and the explication of those terms Koeppen received at the April 18, 1997 hearing were easily understandable by the jury. The jury did not need to rely on any legal interpretation of the bond conditions. There is no reasonable possibility that legal opinions contributed to the conviction.

¶21 Koeppen argues that he was denied his right to a speedy trial and, as a consequence, the prosecution should be dismissed. Our review of this claim is

[5] The parol evidence rule prohibits the introduction of extrinsic evidence to contradict the express language of an unambiguous contract. ***Caulfield v. Caulfield***, 183 Wis. 2d 83, 92, 515 N.W.2d 278 (Ct. App. 1994).

de novo based on the trial court's findings of historical facts. ***State v. Borhegyi***, 222 Wis. 2d 506, 508, 588 N.W.2d 89 (Ct. App. 1998). The four-part balancing test that must be applied to the totality of the circumstances considers: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. ***Id.*** at 509.

¶22 We agree that the nearly two-year delay between the filing of the complaint and trial is presumptively prejudicial under the ***Barker***[6] standard.[7] The record and the trial court's findings demonstrate that while Koeppen asserted his right to a speedy trial, he also engaged in conduct that necessitated adjournments of his case. In fact, on one occasion Koeppen was asserting his right to a speedy trial while seeking an adjournment.

¶23 When the speedy trial demand was made on July 29, 1997, Koeppen's attorney moved to withdraw because of a breakdown in the relationship and threats by Koeppen to file a professional responsibility complaint against the attorney. On August 15, 1997, the court sought to appoint an attorney for Koeppen, but the attorney indicated that because of a prior commitment he could only accept the assignment if the September 2, 1997 trial was adjourned. Koeppen agreed to reset the trial to October 21, 1997. On October 13, 1997, Koeppen changed his plea to one of not guilty by reason of mental disease or defect (NGI) and asked that the trial be adjourned so a doctor could examine him. The court-appointed attorney was permitted to withdraw at the end of October. Koeppen proceeded pro se and made a November 3, 1997 demand for a speedy

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[6] ***Barker v. Wingo***, 407 U.S. 514 (1972).

[7] The criminal complaint was filed on April 28, 1997. Trial was held on March 9, 1999.

trial. At a December 1997 hearing, Koeppen indicated his desire to have counsel and the court explained the difficulty it had in finding counsel given his past conduct. On January 15, 1998, Koeppen appeared with new counsel and withdrew his NGI plea. Trial was held on Koeppen's other criminal case on January 20 and 21, 1997. Trial of this matter was set for February 18, 1998. However, it was later discovered that that trial date conflicted with the trial of another case against Koeppen in a different court. Trial was adjourned to March 17, 1998. Koeppen's fourth attorney was permitted to withdraw on February 27, 1998. On March 2, 1998, Koeppen again asserted a desire to have legal representation. He retained an attorney who was not available for trial on March 17, 1998. Counsel requested a June date to allow him to prepare. Trial was set for June 2, 1998. On May 28, 1998, Koeppen indicated a desire to obtain a transcript of a prior hearing where the court had ruled on the admissibility of "other acts" evidence. When faced with the choice of either proceeding to trial or adjourning to obtain the transcript, Koeppen chose to adjourn the trial, although he indicated that he was not waiving his speedy trial right. Trial was then set for September 1, 1998. At the status conference just before trial, Koeppen again sought the preparation of additional hearing transcripts and an adjournment. December 8, 1998 was the new trial date selected at that conference. At the status conference just before the December trial, Koeppen was not produced from prison due to oversight. The trial court offered to expedite Koeppen's production so that the trial date the following Tuesday could be preserved. Counsel indicated that because of Koeppen's direct involvement in his own defense, there was not sufficient time to still review matters with Koeppen and still argue the motions. The matter was adjourned to March 2, 1999.

¶24 As noted by the trial court, Koeppen's demand for a speedy trial was a "myriad of inconsistencies." The delays were created by Koeppen's change of attorneys and the loss of continuity. These are reasons to be heavily weighed against Koeppen. Moreover, it is clear from the above timeline that the reason for delay was not motivated by an attempt to hamper the defense or any cavalier disregard of the right to a speedy trial. Once Koeppen settled on his fifth attorney, some delay was the result of a crowded court calendar. This is a neutral reason and is weighted less heavily. ***Borhegyi***, 222 Wis. 2d at 512. The balance achieved in weighing the reasons for delay does not favor Koeppen.

¶25 Finally, Koeppen has failed to demonstrate prejudice from the delay. Prejudice is to be assessed in light of the interests fostered by the right to a speedy trial: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. ***Id.*** at 514. There was no oppressive pretrial incarceration or anxiety that could be lifted by a speedy trial since Koeppen remained in custody on other charges. Delay actually aided the defense in providing Koeppen the opportunity to have counsel of choice, explore an NGI defense, obtain transcripts to clarify evidentiary rulings, and provide adequate preparation time. We conclude that the right to a speedy trial was not violated.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.